No. 12441

United States
Court of Appeals
For the Ninth Circuit

HUGO V. LOEWI, INC., a corporation,
Appellant,
vs.
KILIAN W. SMITH,
Appellee.

Brief for Appellee

Upon Appeal from the United States District Court for the District of Oregon.

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STATEMENT OF THE CASE

This is an action to recover the balances due on the purchase prices of two specific hop crops which defendant-appellant bought under contract from plaintiff-appellee.

The action was commenced in the State Court, and was removed to the Federal Court by appellant on the ground of diversity (S.R. 29-36). Both parties waived jury trial, and all issues were tried by the Court. The Court thereafter entered judgment for plaintiff-appellee, based upon findings of fact and conclusions of law (S.R. 47-57).

Consolidation of Records

On trial it appeared that this action involved common questions of law and fact with two other cases then pending before the Court (and now also on appeal to this Court *sub nom.* Hugo V. Loewi, Inc., Appellant v. Geschwill, Appellee, No. 12440, and John I. Haas, Inc., Appellant, v. Wellman, Appellee, No. 12442). Accordingly the parties consented and the District Court ordered that the three actions be tried jointly and that the evidence in any of the actions should be deemed to have been taken and should be considered in each of the others to the extent that such evidence was pertinent, material and relevant (G.R. 34-35, 504; S.R. 47-48, 179; W.R 9, 409-410).[1]

This Court has entered orders in the three cases:

(a) Permitting the documentary exhibits to be considered in their original form without printing or otherwise reproducing them (G.R. 512-513; S.R. 346-347; W.R. 477-478).

(b) Consolidating, for the purposes of the appeal, the record in each case with the records in the other two cases, to the extent that the evidence, exhibits and proceedings contained in the records on appeal in all three cases may be

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1 In order to avoid unwieldy references, the following abbreviations are used to refer to the various parts of the consolidated record:

G. R.—"Geschwill Record," meaning that portion of the consolidated record printed in the case of Hugo V. Loewi, Inc. v. Geschwill, No. 12440.

S. R.—"Smith Record," meaning that portion of the consolidated record printed in the case of Hugo V. Loewi, Inc. v. Smith, No. 12441.

W. R.—"Wellman Record," meaning that portion of the consolidated record printed in the case of John I. Haas, Inc. v. Wellman, No. 12442.

considered as a part of the record in each case, and without duplication of printing (G.R. 515-518; S.R. 354-357; W.R. 480-484).

(c) Permitting cross-references to be made among the briefs in the three cases. (Order endorsed on motion of appellant and consent thereto of appellee, and entered on or about June 2, 1950.)

Cause of Action on Fuggle Hops

The complaint is in two causes of action: One for the price, less advance payment, of the cluster hops which appellant purported to reject (S.R. 2-7); and the other for the price, less advance payment, of the fuggle hops which appellant accepted and shipped out (S.R. 7-9).

Appellant admits (Br. 5) that the balance of the price is due on the fuggle hops. The only question is whether the cluster advance payment should be deducted from the fuggle price, and that depends upon the determination of the cluster cause of action.

The matter can best be illustrated as follows:

(a) *Computation per judgment and appellee's contention—*

Fuggle price	$ 9,997.26	
Less: Fuggle advance	(3,500.00)	
Balance due on fuggles		$ 6,497.26
Cluster price	$11,846.52	
Less: Cluster advance	(3,000.00)	
Balance due on clusters		8,846.52
Total principal due		$15,343.78

(b) Computation per appellant's contention—

Fuggle price	$ 9,997.26	
Less: Fuggle advance	(3,500.00)	
Less: Cluster advance	(3,000.00)	
Balance due on fuggles.		$ 3,497.26
Balance due on clusters		0.00
Total principal due		$ 3,497.26

The uncontested findings of the trial Court (Appendix, post, pp. i, iv-v, xxvi) include the following:

"3. On or about August 19, 1947 plaintiff as seller and defendant as buyer entered into the written cluster hop agreement received in evidence herein. * * *

"4. As a part of the same transaction plaintiff and defendant entered into another contract whereby plaintiff contracted to sell and defendant contracted to buy certain fuggle hops grown by plaintiff in 1947 on certain premises in Marion County, Oregon. Plaintiff duly performed all the terms and conditions on his part to be performed under said contract, and defendant received and accepted said fuggle hops, which consisted of 59 bales weighing 10,986 pounds net, at the price of 91 cents a pound. Against the total price of $9,997.26 was applied the advance payment of $3,500.00 made pursuant to said fuggle contract. The remaining balance was $6,497.26. On October 25, 1947 defendant tendered plaintiff its check [S. Ex. 9] in the amount of $3,497.26 bearing a notation that it was "for Balance on contract delivery 59 bales fuggles". In arriving at said amount defendant deducted the cluster contract advance hereinafter referred to. Plaintiff re-

fused to accept the check because of the stated condition [S. Ex. 10]. Defendant did not at any time pay or offer to pay plaintiff without such condition said balance of $6,497.26 due under said fuggle contract, or said sum of $3,497.26, or any other sum, and said balance remains due and unpaid. * * *

"15. On plaintiff's second cause of action, relating to the fuggle hops, there became due and owing from defendant to plaintiff on October 31, 1947 the sum of $6,497.26, being the contract price of $9,997.26 less the advance of $3,500.00. No part of said balance has been paid."

Toward the close of the trial of this case (S.R. 324) appellant obtained leave to file, and subsequently did file (W.R. 162), an amended answer (S.R. 40-45). In the amended answer appellant sought to obtain credit for the $3,000 cluster advance both as a counterclaim against the cluster cause of action (S.R. 42-43; and see Applt's Br. 20), and also as a credit against the amount due on the fuggle clause of action (S.R. 44). However, appellant on brief states (p. 5):

> "The defendant thus acknowledges a liability to the plaintiff for $3,497.26, which is the net amount of the plaintiff's claim on the fuggle hops less [i.e., after deducting] the $3,000.00 advanced by the defendant to the plaintiff on the cluster hops."

As noted above, the judgment gives credit for the cluster advance by deducting it from the price of the cluster hops.

In the amended answer (S.R. 44) appellant alleged a tender, and a continuing tender, of "$3,497.26 *in full payment of the agreed and contract price for said [fuggle] hops*" less both advances. As noted above, the tender of that sum in full payment was declined by appellee.[2]

All of appellant's specifications of asserted error relate to the cause of action, or the counterclaim, on the cluster contract.

Similarity of Cluster Cause of Action to Geschwill Case

Insofar as the cause of action for the cluster hops is concerned, this case is quite similar to the companion case, with which it was tried and with which it is now on appeal to this Court, of Hugo V. Loewi, Appellant, vs. Geschwill, Appellee, No. 12440. For example, the buyer is the same in both cases; the contracts for the purchase of the specific crops of hops were made about the same time shortly before harvest in 1947; the buyer used the same printed form of contract; and appellant has stated (Br. 5) that the "ultimate issues" are the same. Appellant's brief in this case follows very closely its brief in the Geschwill case, and incorporates a large part of the prior brief by reference.

Pursuant to the Court's permission, and following appellant's example, we shall incorporate by

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2 In *Schumacher v. Moffitt*, 71 Or. 79, 142 Pac. 353, it was held that where the claim was disputed, and where plaintiff had cashed the defendant's check with the words "In full settlement of account to date" written on it, plaintiff was estopped from claiming that there had not been a full accord and satisfaction.

This Court held in *Lilienthal v. McCormick*, 117 Fed. 89, 96: "The law is well settled that there can be no valid tender of part of an entire debt. * * * The proofs should be clear that a tender was fairly made, and that it was absolute and unconditional."

reference a large part of appellee's brief in the Geschwill case. As the trial Court said with reference to the same type of consolidation of proceedings before him (G.R. 504), this will leave for discussion in this case "just the particular core of the controversy about the particular crop."

Specifications of Asserted Error

Appellant has sought to mend its hold by specifying as asserted error two grounds[3] not included in its designation of points on which it intended to rely, and it has abandoned 23 of the 54 points on which it stated it intended to rely.[4]

The first fifteen of the assertions of error are directed to the findings of fact of the District Court. For the purpose of showing in an orderly form that the findings are supported by the evidence,

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3 Specifications of asserted error Nos. 18 and 23 (Applt's Br. 19, 21) are not included in the designated points on which appellant stated it intended to rely (S.R. 62-77). Appellant did not bring up the full record (S.R. 78-79).

For example, appellant now for the first time seeks to assign error (Br. 3, 21) in the trial Court's not granting appellant's motion to dismiss. After the motion was filed the trial Court heard oral arguments and took the matter under advisement (S.R. 39, 83). Subsequently the trial Court filed his memorandum (G.R. 26): "The motions of defendants are provisionally denied. The legal questions raised by the motions are reserved to the pre-trial or trial." The record of the pre-trial proceeding (S.R. 84) is not before the Court.

Jesionowski v. Boston & Maine R. Co., 329 U.S. 452, 458-459, 67 S. Ct. 401, 91 L. Ed. 416; *Ritchie v. Drier*, App. D.C., 165 F. 2d 238, 240, cert. den. 334 U.S. 860, 68 S. Ct. 1518, 92 L. Ed. 1780; *Bennett v. Scofield*, 5 Cir., 170 F. 2d 887, 889.

4 The points (S.R. 62-77) on which appellant no longer relies, and which have not been made specifications of asserted error, are Nos. 4-7, 11, 12, 16, 29-54.

In addition, appellant has restricted the error claimed in three other points: Point No. 3 (S.R. 63) has been confined down to the matter in specification No. 3 (Br. 14); point No. 13 (S.R. 65), to the matter in specification No. 7 (Br. 15); and point No. 14 (S.R. 65), to the matter in specification No. 8 (Br. 15).

the findings are set out in their entirety in the Appendix to this brief with citations to the record on each contested point.

The Issues

The specifications of asserted error can be grouped into two main divisions: (a) Those relating to the quality of the hops, appellant's knowledge thereof, appellee's performance and appellant's non-performance (being specifications Nos. 1 through 17, and 19, Br. 13-20). (b) Those relating to appellee's remedy and measure of recovery (being specifications Nos. 20 through 22, and non-designated specifications Nos. 18 and 23, Br. 19-21).

The "ultimate issues" proposed by appellant (Br. 5) are the same two as in the Geschwill case: One relates to the commercial quality of the hops; and the other to appellee's form of relief and measure of recovery.

Instead of paraphrasing here what was said in appellee Geschwill's brief on these matters the following portions of that brief are incorporated by reference in this brief:

> The general background included in the narrative statement in appellee Geschwill's brief, and particularly pp. 5-9 and 13-15.
>
> The material on the issue as to the quality of the hops, being pp. 19-45 of appellee Geschwill's brief.
>
> The material on the issue as to the form of action, being pp. 46-75 of appellee Geschwill's brief.

The Core of the Controversy

Appellant claims that it was entitled to reject the cluster hop crop because it showed mildew. The contract does not mention mildew,[5] but appellant claims that the general language as to "prime quality" in the contract constitutes a seller's "warranty" of freedom from mildew (Br. 28, 37).

With respect to this matter the trial Court found the following facts, which are not contested by appellant (Appendix, post, pp. v, ix-x, xii):

> "5. In 1947 there was, and defendant knew that there was, widespread mildew in cluster hop yards in the Willamette Valley in Oregon. The parties entered into said cluster hop contract shortly before picking time, and the hops which defendant contracted to buy were then formed and in existence on the vines. Before entering into said cluster hop agreement defendant inspected said cluster hop crop and defendant knew that said hop crop then showed some mildew * * *
>
> "6. By said cluster hop agreement defendant contracted to make an advance payment to plaintiff of $2,500.00 in order to enable plain-

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5 The contract does mention "mold" (S.R. 11), and counsel suggest (Br. 11) that "mildew is a type of mold".

This is based on Mr. Hoerner's testimony (G.R. 370) that *botanically* "downy mildew" could roughly be considered a type of mold or mildew. By this apparently he meant that mildew is a *fungus*, i.e., any of a group of plants comprising the molds, mildews, rusts, smuts, etc. (Webster's New International Dict., 2d Ed.)

Such mildew is not the "mold" referred to in the standard form of hop contract. Such mold is caused by the hop aphid, i.e., the hop louse. (G.R. 78-81.)

The trade terms used in the contract should not be given meanings different from those understood by the parties. (See appellee Geschwill's brief, pp. 21-30.)

tiff to defray the necessary expenses of cultivating and picking said hops and of harvesting and curing the same. * * *

"7. Said cluster hop agreement provided in substance that if said growing crop at or before the time of picking was not in such condition so as to produce the quality of hops called for under the terms of the agreement then the defendant buyer would be discharged from any obligation to make said advance. Before and at the time of picking defendant knew that there was mildew in plaintiff's said crop of cluster hops, and that said crop when picked and baled would in normal course show such mildew. On or about August 26, 1947 defendant again inspected said hop crop during picking and before making the advance, and thereupon defendant elected to and did make the advance payment in the sum of $3,000.00, a larger amount than called for by the contract. Any defect which said hop crop may have had by reason of blight or mildew was apparent to defendant at the time of said inspection. Defendant at that time instructed plaintiff to continue picking said hops under said contract, and plaintiff did so in reliance upon defendant's said instruction and advance payment. The mildew in said crop did not thereafter become more pronounced or prevalent. * * *

"12. On or about October 16, 1947 defendant rejected and refused to pay for said cluster hop crop tendered by plaintiff. On several occasions after said balance became due and owing, plaintiff duly made demand on defendant for the payment thereof. Defendant refused to pay

for said hop crop on the particular ground that said cluster hops were blighted and dirty picked, and on no other specific ground. * * * Said crop of hops was not any more blighted or mildewed than when defendant contracted to buy the same, or when defendant elected to make the advance payment, or when defendant instructed plaintiff to continue picking. The leaf and stem content was within the tolerance allowed by the terms of said agreement."

Based largely upon those facts, which are uncontested, we contend:

(a) The parties clearly did not intend the contract to include any "warranty" of freedom from the mildew which was known to exist.
(b) Appellant cannot assert any such "warranty" because appellant did not rely thereon.
(c) Appellant cannot assert any such "warranty" because it induced appellee to believe, and to act on the belief, that it would not do so.
(d) Appellant is estopped from asserting any such "warranty" because of its conduct in making the harvesting advance and instructing appellee to continue picking.[6]

We also make two other contentions which are in addition to and not dependent upon the foregoing points, and as to which appellant contests some of the trial Court's findings of fact:

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6 In other words, the governing principle of the case is as stated by the trial Court in his memorandum of decision (S.R. 46):

"* * * In the Smith case the grower asked for directions, and was encouraged by the buyer to go further into buyer's debt, after both parties knew the hops were mildewed.

"Under these circumstances, the buyer cannot now reject the hops on the ground that the hops do not comply with the contract. This would be abhorrent to equity."

(e) Even though they showed some mildew, these hops were good merchantable hops, and of good brewing value. (Appendix, post, pp. xvi, xix-xx.)

(f) Even though they showed mildew like most of the 1947 cluster hops in the Willamette Valley, these hops were "prime quality" for that year. (Appendix, post, pp. xxiv-xxv.)

Narrative Statement

All of the determinative facts appear in the Court's findings (S.R. 48-54, and Appendix, post, pp. i et seq.), and much of the general background is stated in appellee Geschwill's brief (pp. 5 et seq.). We shall not reiterate that material here, but rather fill in some of the background of this particular case which we believe to be inadequately or incorrectly described in appellant's statement of the case (Br. 6-13).

Before the middle of August, 1947, Mr. Smith had contracted to sell his first 100 bales of fuggle hops to Mr. Seavey, an independent hop dealer for whom Mr. Smith had previously worked as a hop inspector. At that time Mr. Smith had not sold either his cluster crop or the remainder of his fuggles over the 100 bales. (S.R. 95, 104, 243.)

About the middle of August Mr. Fry went out to Mr. Smith's hopyard to see about buying hops for appellant. Mr. Fry was a field man and hop inspector for Mr. Paulus, appellant's local represen-

tative.[7] Mr. Fry had previously been out inspecting the hopyards in the Willamette Valley with Mr. Oppenheim, appellant's president. It was from the surveys which he made about this time with Mr. Fry and Mr. Paulus[8] that Mr. Oppenheim gained his first-hand information of the wide-spread mildew in the Valley. (S.R. 118-119, 310-311; G.R. 291, 421-422, 426, 449, 453.)

When he went out to Mr. Smith's yard about the middle of August (S.R. 104, 209), Mr. Fry saw the fuggle hops being picked (S.R. 106, 209). The clus-

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7 On trial appellant's counsel declined to stipulate (G.R. 289-290) that Mr. Paulus and his employees were acting as agents for appellant. Accordingly, the agency agreement between appellant and Mr. Paulus was introduced in evidence (S. Ex. 51).

The agreement requires Mr. Paulus to "create an organization," and provides that the "business of such organization shall be * * * to negotiate on behalf of the Company [Hugo V. Loewi, Inc.] with growers and dealers for the purchase of future and spot hops grown or held for sale in the aforesaid territory [which includes Oregon], * * * to take care of the making, recording and filing of all contracts on behalf of the Company, to supervise compliance by growers and others with the terms thereof, * * * and to do such other and further things as the Company may deem appropriate to increase its business and prestige."

Upon the evidence there can be no question but that Mr. Paulus and Mr. Fry had authority from appellant for their dealings with Mr. Smith (e.g., S.R. 208-209, 228, 230, 243-245, 256-257, 310-312).

8 In appellant's brief (p. 6) counsel characterize Mr. Paulus as a "commission broker or buyer of hops for the defendant *and other hop dealers*". (Italics added.)

The agency agreement between Mr. Paulus and appellant, referred to in footnote 7, provides: "Paulus shall devote his entire time and attention to the aforesaid business and will not engage in any other business or in the same or a similar business, in any other place, except the production of hops."

Counsel indicate (Br. 6) that they base their above-quoted statement on the following testimony by Mr. Paulus (G.R. 322-323):

"Q. Do you buy hops for Hugo V. Loewi, Inc.?

A. Yes.

Q. Do you buy hops for other dealers?

A. I have, on occasions, yes."

The record does not show whether such "occasions" were prior to his agreement with appellant when Mr. Paulus was associated with another hop concern (G.R. 322), or whether such "occasions" were when appellant itself instructed Mr. Paulus to negotiate deals with other brokers (G. Ex. 41).

ter hops were then already formed on the vines, nearly ripe for harvest (S.R. 138, 142, 196), and Mr. Fry examined them closely. As Mr. Smith said (S.R. 105):

> "* * * He [Mr. Fry] told me he had been around the valley the last few days with his buyers and he said he knew there was mildew in the valley. I said, 'You had better look at mine and see how bad they are and see if you really want to buy them,' because in my experience in buying hops I would like to know what the crop looked like, especially at that time, because they were ready for harvesting.
>
> "He was a bit reluctant to go back and look at the crop but he finally did go back, and we walked through the whole yard, and I asked him how it compared with these other yards that he had seen through the valley and he said that some yards were much worse and some were better—I mean in better condition as far as mildew infection was concerned.
>
> "I told him I wanted to be sure and let his boss know what they were like before he contracted them, so at a later date he came and signed me up on a sales slip."[9]

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9 Mr. Smith knew that his clusters had less mildew than most in the Valley (S.R. 101, 188-190), but he also thought that the dealers' low estimates of the production might be mistaken and the market might fall (S.R. 173). Further, harvesting costs were very high that year (S.R. 99-100, 113, 173). Accordingly, Mr. Smith did not want to harvest the clusters unless they were sold (S.R. 172-174, 176). It was for this reason that he insisted that the buyer be fully advised about the crop. As he testified on cross-examination (S.R. 172-173):

> "I wanted him [Mr. Fry] to definitely understand what the hops were like, and I wanted him to definitely take that advice to his principals.
>
> Q. I see. That was your purpose, to inform his employer, Mr. Paulus, as to what the condition of your hops was; is that right?
>
> A. Yes. I wanted him to know so he could tell me whether he wanted to buy them or not to buy them. I wanted him to tell me that."

At this time Mr. Fry had only an order for fuggles and Mr. Smith wanted to sell both the clusters and the remainder of the fuggles together (S.R. 104). As Mr. Fry said (S.R. 210-211), Mr. Smith

> "* * * had about 50 bales [of fuggles] left, so he wanted to sell his clusters, too, and I only had an order for fuggles, so he said, 'Go back and see if you can get an order on clusters as well as fuggles.' So I went back and talked to Mr. Paulus."

Subsequently, after Mr. Oppenheim had made his inspection of the hopyards (S.R. 310), and his estimate of a short crop (G.R. 453), he gave orders to buy more hops, including some clusters. Mr. Oppenheim testified (S.R. 310):

> "* * * I gave him [Mr. Paulus] orders to buy a few hundred bales additional of hops, and we agreed to take clusters as well as fuggles."

Having been authorized to do so (S.R. 208, 228, 244-245), Mr. Fry returned to see Mr. Smith and signed him up on a sales slip. Mr. Fry testified (S.R. 195):

> "It was about August 17th that I had signed him on a sales slip and purchased his hops."

The agreement was for the purchase of the surplus fuggle hops over the existing contract with Mr. Seavey, and the entire crop of cluster hops, at a floor price of 81 cents a pound or the market price at a date selected by the grower, with the usual premiums and discounts. Mr. Fry and Mr. Smith mutually agreed on an estimate of 10,000 pounds of clusters, and the picking advance speci-

fied in the contract was computed on that figure.[10] (S.R. 10-13, 19-23, 107-108; S. Exs. 1, 2.)

On August 19th Mr. Byers, from Mr. Paulus' office, went out to Mr. Smith's yard with two contracts for him to sign and paid him the $3,500 advance payment on the fuggles. Contrary to its usual practice appellant had divided the transaction into two papers, one for the fuggles and the other for the clusters. The contracts were signed for appellant by Mr. Oppenheim in the Salem office. (S.R. 108-110, 220, 225-226, 230, 262; S. Ex. 1.)

Picking on the clusters began about August 25th and continued until about September 3rd (S.R. 110). Not only did Mr. Smith instruct his pickers to skip the badly mildewed vines and branches (S.R. 134), but they did so on their own volition because, as he said (S.R. 149):

> "after all, they were looking for the big hops, nice clusters, because that is what makes weight in their baskets."

While approximately 25 per cent of the hops were thereby left on the vines (S.R. 133), still the pickers naturally stripped off some "red" hops, just as

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10 Counsel state (Br. 7) that this was an estimate of Mr. Smith's "mildew-free production".

Mr. Smith testified (S.R. 141) that such an idea "was not even mentioned."

He said: "* * * it [the estimate] was a basis for arriving at picking advances and to get somewhere close to letting him know how many we would have." (S.R. 141.) "That was the figure that we mutually agreed upon. It was conservative." (S.R. 138.) "It is usually customary to underestimate so you are sure you can at least deliver the full amount." (S.R. 140.)

And see Appendix, post, pp. ii-iv, v-ix, ix-x.

they did some leaves and stems (Appendix, post, vii-ix).[11]

About the third day of picking Mr. Smith called Mr. Paulus' office for someone to come out and look at his yard again and to furnish the picking advance (S.R. 110-111). Mr. Fry came out around noon (S.R. 111) and told Mr. Smith that if the hops were about the same as they had been before he would make the advance (S.R. 214-215).

Mr. Fry then looked at the hops in the pickers' baskets and saw the "red" hops among them (S.R. 212-213). He and Mr. Smith discussed the picking and also the increase in pay to five cents a pound green weight[12] being generally offered to pickers.

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11 Counsel assert (Br. 7): "* * * plaintiff did not deny that it was understood that the plaintiff would not pick any mildewed hops."

Actually, Mr. Smith testified, concerning the time Mr. Fry inspected the hops before entering into the contract, as follows (S.R. 106): "He [Mr. Fry] said they needed hops, and he didn't see how they could buy hops that were not mildewed because most of them in the valley were mildewed."

Mr. Fry testified that during picking he told Mr. Smith he would look at the hops and if they were about the same as they had been before he would make the harvesting advance (S.R. 214). Mr. Fry did look at the hops in the pickers' baskets; he saw "red" hops among them; and he made an advance larger than specified in the contract (S.R. 214-215).

Counsel also erroneously assert (Br. 8): "The plaintiff admittedly made no earnest effort to avoid harvesting mildewed hops." Counsel so conclude on the assumption that the grower should have either picked burr-by-burr, or should have discarded every whole vine showing any mildew.

There is no evidence that burr-by-burr picking was either possible or contemplated (Appendix, post, ii-iv).

Since the mildew was uniform through the yard (S.R. 151, 196), it would have practically nullified the contract if, as counsel suggest, the grower had discarded every whole vine, and all the good hops on it, where any of the hops on it showed any mildew.

12 In the curing process the hops are dried down to about one-fourth of their green weight. "If you have, say, four pounds of green hops, you have one pound of dried hops; about one-to-four." (G.R. 191.)

Of course, the picking charge does not include the other costs of hauling, drying, baling, etc. (G.R. 192).

Mr. Fry said, as Mr. Smith testified (S.R. 174):

> "He said, 'Sure, we want you to pick them.' He says, 'If you need more money, call us and we will give you some more.' He said if I had to go to six or seven cents a pound, why, feel free to ask for more money."

Concerning this conversation Mr. Smith testified (S.R. 149):

> "* * * he stated at that time that he didn't see how we could get away from getting some blight in."
>
> "He said to continue to pick them as clean as possible and do the best I could."

Mr. Fry had brought out with him a signed check payable to Mr. Smith with the amount blank, and Mr. Fry had authority to fill in the amount in his discretion (S.R. 214-218). Having seen what had been picked and how they were picking Mr. Fry filled in the check for $3,000 and gave it to Mr. Smith (S.R. 113, 213-215; S. Ex. 8). The contract called for an advance payment of $2,500 (S.R. 13), but they mutually agreed on an advance in the larger amount.[13] Mr. Smith testified (S.R. 112-113):

> "* * * I told him I thought I would have enough money with that but he says, 'If you need more, why, call us up.' He said, 'If you have to go higher and pay more than five cents a pound, you might need some more money.' "

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13 The advance seems to have been computed on the basis of 30 cents a pound cured weight on the estimate of 10,000 pounds (S.R. 113). At that time they discussed the size of the crop—that it looked as if it would turn out somewhat heavier than they first anticipated (S.R. 112). Mr. Smith testified (S.R. 114) that Mr. Fry said, " 'It is hard to determine exactly until you are through picking.' " As Mr. Oppenheim said in another connection (G.R. 453), "Nobody in the world can guess a hop crop until it is in the bales."

Before Mr. Fry left the hopyard that day Mr. Smith asked him to stop up at the kiln to check on the hops there and to give the drier instructions (S.R. 114), and Mr. Fry did so (S.R. 214).

Mr. Smith had previously delivered the fuggle crop at the Oregon Electric warehouse in Salem, and about September 10th, after the cluster hops had been picked, cured and baled, he also delivered them at the same place, pursuant to the contract (S.R. 115, 251; Appendix, post, x). The official picking analyses were received, showing 7% leaf and stem content in the fuggle crop and 9% in the clusters (S. Exs. 14, 33A). Thereafter about September 17th Mr. Smith selected as the sales prices the then growers' market prices of 85 cents a pound on the clusters and 90 cents on the fuggles, subject to the usual sliding scale of premiums and discounts on the picking (S.R. 117-118; S. Exs. 4, 6; Appendix, post, iv, xii). Mr. Paulus promptly advised appellant of the price selections (S. Ex. 19).

The prices selected were then in fact the growers' market prices, because the market had adjusted to the mildew by allowing a premium of five cents a pound for the mildew-resistant fuggles (S.R. 240, 311). The ordinary market price for good, average-quality clusters was 85 cents a pound. As Mr. Ray expressed it (W.R. 255):

> "Q. Do you know what the going market price on good, average-quality hops was in 1947, say, in September of that year?

A. Yes. I know that, * * *. During September buyers were anxious to buy hops selling at 85 cents a pound, 85 cents a pound for prime-quality clusters, Oregon hops, and it was my opinion that 85 cents a pound was paid for cluster hops that were not fully prime in quality, and I would call those good hops."

There is substantial evidence that these were good merchantable cluster hops, of good brewing value, and of prime quality for 1947 according to the custom of the hop trade (Appendix, post, pp. xiv-xvi, xix-xx, xxiv-xxv). The three expert witnesses called by the seller testified as follows:[14]

Mr. Aman, the hop grower, found that these cluster hops were somewhat better than the average that year (S.R. 189-190).

Mr. Cornoyer, the independent hop dealer with years of experience, found that these hops were merchantable. He said that, only because of the mildew, they would not have been considered prime quality *in prior years* (i.e., when mildew was not the common characteristic of the Willamette Valley clusters), but he found that these were average for 1947, and that the mildew did not affect the lupulin, the valuable part of the hop (S.R. 180-183).

Mr. Bullis, the hop chemist, testified that the tests on samples from these clusters were at least average for the 1947 Oregon commercial lots tested by the Department of Agricultural

14 Appellant's three experts were: Mr. Ray and Mr. Eismann, who were officials representing large dealer-litigants, and Mr. Hoerner, who conducted an unique experiment for appellant. Their testimony is considered in the Appendix, post, pp. xvii-xix.

Chemistry of Oregon State College (S. Ex. 36; S.R. 333-336).[15]

The record shows that, not only in isolated cases, but as a general practice in 1947, Oregon cluster hops showing some mildew such as these, and covered by "prime quality" contracts such as this, were in fact accepted in the trade.[16]

About September 10th one early sample of these hops had been sent appellant in New York (S. Ex. 45-A).[16a] Thereupon, and less than a month after

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15 Three chemical tests were made on these clusters, one for Mr. Paulus (S. Ex. 25) and two for Mr. Smith (S. Exs. 36, 37). The analyses of these hops showed an average Alpha resin of 4.74, an average Beta resin of 9.31, and an average preservative value (using Mr. Bullis' formula, S.R. 333) of 78.4.

The Oregon commercial lots (S. Ex. 36) tested by the Department that year showed an average of 4.61 in Alpha resin; 8.75 in Beta resin; and 75.3 in preservative value.

With respect to such chemical analyses Mr. Oppenheim testified (S.R. 318): "I would say that all of the larger [breweries] and some of the smaller ones have their own laboratories. It is becoming more and more so."

In this case appellant made an issue concerning the value of these hops to its brewer customers (e.g., S.R. 322). Accordingly evidence on the inherent chemical value of the hops was proper. In other words, this case comes within the rule of *Wolf v. Edmunson*, 9 Cir., 240 Fed. 53, rather than *Netter v. Edmunson*, 71 Or. 604, 143 Pac. 636.

16 Such hops were readily taken by the breweries. As Mr. Willig, manager of the Oregon Hop Producers Cooperative, said with reference to Mr. Wellman's hops which also showed a touch of mildew (W.R. 152-153):

"Q. Would you say from your experience in selling hops over the years that hops of the same general character and quality of these had been accepted under this type of contract?

A. Yes, they had.

Q. In 1947 to whom did you sell your hops?

A. Directly to the breweries.

Q. Did you sell hops to breweries of the same general kind and quality as you have seen here in the courtroom?

A. That is about all we had to sell that year in the form of late hops.

Q. Did they accept them and make beer out of them?

A. That is right."

16a Another early sample sent at the same time was delayed, and was not received until October 14th (S. Ex. 43; S.R. 313).

he had signed the contracts in Oregon, Mr. Oppenheim from New York instructed Mr. Paulus to reject the clusters, take the fuggles, and charge the grower with the advances on both crops against the fuggle proceeds (S. Exs. 16, 17).

The two specific grounds stated for the purported rejection were "dirty picked" and "blighted" (S.R. 260; S. Exs. 16, 17). After receiving advice (S. Ex. 18) that the picking on the clusters was only 9% (i.e., within the percentage allowed by the contract, S.R. 12), appellant telegraphed Mr. Paulus (S. Ex. 21):

> "Referring samples 14 and 64 Kilian Smith willing accept delivery Lot 14 fuggles but again advise you positively refuse accept delivery seventy-three bales Lot 64 [clusters] and instruct you to reject this lot and demand refund all advances or apply same on fuggle delivery * * *."

Mr. Paulus then wrote appellant saying that in his opinion the sample on the basis of which the rejection was made[17] was "hardly representative of the entire lot," and asking for consideration of the additional samples he was sending (S. Ex. 22; S.R. 261). Appellant replied to Mr. Paulus by its form letter of September 30th refusing to accept the hops "as prime delivery" and suggesting that Mr. Paulus

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17 Appellant did not introduce this sample in evidence. On trial Mr. Paulus testified (S.R. 277):

"Q. Did they, the Loewi corporation, return the original type sample on the basis of which they rejected the crop?

A. Yes.

Q. Is it among these?

A. No."

inspect and grade the hops and forward tenth bale samples (S. Ex. 27; and compare G. Ex. 17).

Mr. Fry caused Mr. Smith to sign the statement that the inspection and weighing in would not be considered an acceptance (S. Ex. 5). Mr. Fry told Mr. Smith that the statement had to be signed "before they could even touch the hops" (S.R. 123, 205, 216). The same "form" of inspection was conducted as in the Geschwill case (S.R. 123, 204-205, 215-216; S. Ex. 13; appellee Geschwill's brief, pp. 12-16). Mr. Oppenheim promptly thereafter sent Mr. Paulus his formal letter of rejection, claiming the same two specific grounds of "badly blighted" and "dirty picked" (S. Ex. 29).[18]

At that time the fuggles had not yet been formally accepted. Subsequently, on October 22nd, appellant telegraphed Mr. Paulus to "ship immediately" to a certain brewery, in the name of another dealer, some designated lots of fuggles including "entire Lot 14," i.e., the Smith fuggles (S. Ex. 30). Thereafter the fuggles were formally accepted, and Mr. Smith was tendered a check for the fuggle price less both the fuggle and the cluster advances, which check was marked "for Balance on contract delivery

18 In view of the facts that appellant decided to reject the hops on the basis of a non-representative sample, that the claimed defect in picking was admittedly not true, that appellant was fully advised of the mildew before it made the contract and before it made the picking advance, and that there was no good-faith inspection of the crop in the warehouse, it appears that the real reason for the rejection was not as claimed. The real reason may have been based on such considerations as the fact that the Oregon production was larger than the dealer had expected and prices would therefore decline, or the anticipation that grain restrictions on brewers would curtail their demand for hops. See Appendix, post, pp. xv-xvi; appellee Geschwill's brief, p. 11, note 11.

59 bales fuggles" (S.R. 126-127; S. Exs. 9, 33-C). The tender was declined and the check returned (S.R. 127; S. Ex. 10).

Summary of Argument

Appellee's argument is directed to the two "ultimate issues" posed by appellant (Br. 5):

I. *Issue on quality of hops.* The trial Court found that the hops upon tender and delivery substantially conformed to the quality provisions of the contract. The findings are clearly supported by the evidence (Appendix, post, pp. xiv-xvi, xix-xx, xxiv-xxv). (This is in answer to appellant's points I, II, and III, Br. 21, 23-38.)

The points relating to the particular core of this controversy (ante, pp. 11-12) are discussed under this issue.

II. *Issue on form of action.* The trial Court concluded that upon the facts of this case, where the seller fully performed and made a valid tender of the goods, the seller can recover the balance due on the contract in this form of action (S.R. 55). The trial Court's conclusion is clearly supported in law. (This is in answer to appellant's points IV, V, VI, VII, VIII and IX, Br. 21-22, 39-44.)

I. ISSUE ON QUALITY OF THE HOPS

The trial Court found that the hops upon tender and delivery substantially conformed to the quality provisions of the contract. The finding is clearly supported by the evidence.

On this point appellant (Br. 23-38) has followed quite closely its argument in its brief (pp. 20-46) in the Geschwill case. Accordingly, in answer thereto, we incorporate by this reference the material on the corresponding point in appellee Geschwill's brief, pp. 19-45. The following discussion is supplementary to that material, and is particularly applicable to the controversy in this case.

A. *There was no "warranty" that the hops would be free of mildew.*

This point involves the application to the facts of this case of the following principle:

> "* * * a warranty in general terms is held not to cover defects which the buyer must have observed. This is a rule of interpretation and is based on an endeavor by the court to give effect to the intention of the parties." Williston on Contracts, Rev. Ed., §972.

The only defects claimed by appellant in purporting to reject these hops related to the picking and the mildew. The leaf-and-stem content was admittedly within the percentage allowed by the contract. (Appendix, post, pp. xiii et seq.) On brief appellant bases its objection to the hops on the remaining claim about mildew. Appellant contends (Br. 24, 37) that the general wording in the

"prime quality" clause of the contract constitutes a "warranty" of freedom from mildew.

We have seen in appellee Geschwill's brief (pp. 21-37) that the terms used in the "prime quality" clause have distinctive meanings in the hop trade, and that in 1947 the trade in fact accepted hops showing such mildew as these under the standard "prime quality" contracts. But even assuming that the general language in the printed-form contract would usually imply freedom from mildew, upon the facts here it is clear that the parties did not intend any such meaning.

Here the buyer knew that the crop when harvested would in normal course show the mildew. The price to be paid was the ordinary market price for such hops. Nothing indicates that the parties contemplated any impossible attempt to harvest a small quantity of choice, completely mildew-free hops. (Appendix, post, pp. ii-ix.)

It cannot be assumed that the parties bargained either for a nullity, or for a mere option on the part of the buyer to take the hops if the resale market went up. They manifestly bargained for the type of crop which they knew existed—what may be termed prime quality 1947 hops showing some mildew.

The principle involved is illustrated by *Standard Cotton-Seed Oil Co. v. Excelsior Refining Co.*, 47 La. Ann. 781, 17 So. 303, 49 Am. St. Rep. 386. There the contract called for "prime crude cotton-seed oil,"

but at the time the contract was entered into, late in the season, there could only be produced "prime cotton-seed oil *of the season.*" The Court held that the article with respect to which the parties were contracting "was necessarily the kind of article which could be manufactured at that late time by the seller."

B. *Appellant relied on its own inspection, and cannot now claim a warranty.*

The trial Court found (Appendix, post, p. xxi):

> "Defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of hops would be any different in condition or quality than said crop actually was when tendered and delivered as aforesaid."

The finding is supported by the evidence (Appendix, post, pp. xxii-xxiv).

Justifiable reliance is the essence of warranty. §71-112, O.C.L.A.; Williston on Contracts, Rev. Ed., §972. Here the buyer carefully inspected the crop, knew its condition, and relied upon its own judgment. The seller made no representation that the crop would be other than in fact it was. The seller delivered the very crop for which the buyer bargained, and the buyer cannot now claim a warranty to relieve it of its bargain. *Paul v. Salisian,* 87 Cal. App. 721, 262 Pac. 779; *Loose v. Flickinger,* 121 Cal. App. 77, 8 P. 2d 517; *Gonter v. Klaber & Co.,* 67 Wash. 84, 120 Pac. 533.

C. *Appellant cannot assert a claimed "warranty" which at the time the contract was made appellant led the grower to believe it would not assert.*

Appellant is now asserting a claim which it induced the grower to believe it would not rely upon. The grower carefully insisted that the buyer be fully advised as to the condition of the crop before contracting its purchase. As Mr. Smith testified (S.R. 172-174):

> "I wanted him to definitely understand what the hops were like, and I wanted him to definitely take that advice to his principals. * * *
>
> "I wanted him to know so he could tell me whether he wanted to buy them or not to buy them. I wanted him to tell me that. * * *
>
> "It was my opinion that they had mildew, and if that had anything to do with it they can always find something—some basis of rejecting hops when the market slips down. And they definitely had mildew and they knew it."

Mr. Fry made the inspection, conferred with his principal, returned to Mr. Smith's hopyard, told him they did want to buy the crop, and signed him up on a sales slip.

This contract was made, not in the spring of the year, but in the fall just before harvest. The hops were then formed on the vine and their condition was apparent to the buyer when it made its inspection.

As soon as the appellant signed the grower up on the sales slip he became contractually obligated

with respect to the specific crop, even though the crop had not yet been harvested and a more formal contract was to be made. *Hugo V. Loewi v. Long,* 76 Wash. 480, 136 Pac. 673. There was no mere option on the part of the grower. Likewise, neither the sales slip nor the subsequent mortgage-contract was a mere option on the part of the buyer. *Gonter v. Klaber & Co.,* 67 Wash. 84, 120 Pac. 533; *Livesley v. Johnston,* 45 Or. 30, 76 Pac. 13, 946, 65 L.R.A. 783, 106 Am. St. Rep. 647; *Wigan v. La Follett,* 84 Or. 488, 165 Pac. 579.

If at the time of the contract the buyer thought it would take the cluster crop if the Oregon production was short, but otherwise would take the fuggles and reject the clusters, the buyer certainly did not communicate such thoughts to Mr. Smith.[18a]

Having induced the grower to believe that it would not rely upon such a claimed warranty, and having caused him in reliance thereon to enter into the contract and to obligate himself to perform at substantial expense, the buyer should not now be heard to assert a contrary claim. *Lilienthal v. Cartwright,* 9 Cir., 173 Fed. 580, 584; *Marshall v. Wilson,* 175 Or. 506, 518, 154 P. 2d 547.

D. *The buyer is estopped by its subsequent conduct from asserting any such claimed "warranty."*

The contract provides that if at or during picking time the crop is not in condition to produce

18a The Oregon statute (§2-222, O.C.L.A.) provides: "When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail, against either party, in which he supposed the other understood it; * * *"

the quality of hops called for, the buyer is discharged from the obligation to make its picking advance. At the time such an advance is made the buyer "must pass an honest judgment as to whether or not the crop is in the proper condition" for the production of such a crop of hops as is bargained for. *Livesley v. Johnston, supra,* 45 Or. at 48. It is not disputed that at the time of picking the buyer knew that the crop when picked and baled would show the mildew. Nevertheless, the buyer made the advance in a sum greater than the contract called for, and instructed the grower to continue the picking. (Appendix, post, pp. ix-x.)

Appellant argues (Br. 34-36) that it did not bargain for this specific crop, that the seller "assumed the risk" of harvesting a mildew-free crop, and that if the buyer was not tendered choice hops there would be a "failure of consideration." Counsel say (Br. 35), even if appellant knew at the time of the contract that the harvested crop would in normal course show such mildew, the doctrine of existing unknown impossibility, or indeed of supervening impossibility, would excuse the buyer from performance.[19] In essence appellant's argument (Br. 32, 34-35) seems to be that it must be conclusively presumed the parties contracted for the impos-

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19 Appellant's authorities are (Br. 35):

Restatement of Contracts, §456, which deals with existing impossibility of which the promisor neither knows nor has reason to know.

Restatement of Contracts, §281, which deals with destruction of subject-matter *after* the contract is made.

Williston on Contracts, Rev. Ed., §838, which deals generally with excusable supervening impossibility.

sible, but the buyer had an option to accept less than the impossible in performance.

It is believed appellant's argument is without basis in the facts. But in any event it relates to the time the contract was made. Even assuming the buyer then had an excuse, the excuse no longer existed after the buyer, knowing the manner of picking and the condition of the hops which had been picked, instructed the grower to continue picking and elected to make the harvesting advance. "The principle is general that wherever a contract not already fully performed on either side is continued in spite of a known excuse, the defense thereupon is lost and the injured party is himself liable if he subsequently fails to perform, unless the right to retain the excuse is not only asserted but assented to." Williston on Sales, Rev. Ed., §191c; Williston on Contracts, Rev. Ed., §688.

E. *The hops were merchantable.*

The trial Court found (Appendix, post, p. xiv):

> "Said 1947 crop hops produced by plaintiff on said premises and tendered to the defendant under said contract were merchantable."

The finding is supported by the evidence (Appendix, post, pp. xix-xx).

The contract price here was the ordinary market price for Oregon cluster hops; and the market price for cluster hops was discounted from the market price for the mildew-resistant fuggles. These were

good average cluster hops such as were bought and sold at that market price (Appendix, post, pp. xix, xx, xxiv, xxv).

Mr. Oppenheim testified:

> "We are not specialists in any better than ordinary hops. We are handling the same hops as the other people do." (S.R. 308.)
>
> "* * * we simply sell hops as good hops." (G.R. 452.)

Appellant purchases hops to resell to brewers, and the evidence is that these hops were of good brewing value (ante, pp. 20-21, and Appendix, post, xvi).

When the buyer was tendered these hops for the ordinary price, the buyer had all it bargained for.

E. *According to the custom of the hop trade these were prime quality 1947 Oregon cluster hops.*

The trial Court found (Appendix, post, p. xxi):

> "Said hops were of substantially the average quality of such Oregon cluster hops actually accepted in 1947 by the hop trade generally and by defendant under contracts containing the same type of quality provisions. Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said contract."

The findings are supported by the evidence (Appendix, post, xiv-xvi, xix-xx, xxiv-xxv).

In essence appellant requests this Court to re-try the case on this sole factual issue (Br. 37). We submit (1) that, independently of this point, the

judgment is supported on the other grounds discussed above, and (2) that the trial Court's findings and the supporting evidence on this issue are equally determinative. Rule 52(a), Federal Rules of Civil Procedure; *Seidenberg v. Tautfest,* 155 Or. 420, 426, 64 P. 2d 534.

II. ISSUE ON FORM OF ACTION

Appellee, having fully performed the contract, and having made a valid tender of the hops, can maintain this action to recover the balance due on the contract.

On this point the form of contract is the same as in the Geschwill case and the surrounding circumstances are substantially similar. Appellant (Br. 39 et seq.) has adopted its argument on the point from its brief in the Geschwill case. In answer thereto, we incorporate by this reference the material in appellee Geschwill's brief, pp. 46-75.

CONCLUSION

The core of the controversy in this case is whether upon the facts appellant can assert a claimed warranty of freedom from mildew based on the general language about "prime quality" in the printed-form contract. We submit:

(a) The parties intended no such "warranty" because at the time the contract was made the hops were known to be mildewed, and at that time only prime quality clusters showing such mildew could be produced.

(b) Appellant relied on its own inspection of the crop, both before making the contract and also before making the advance payment and instructing the grower to continue picking. The essence of warranty is justifiable reliance, and appellant did not rely upon any such "warranty" as now claimed.

(c) The grower insisted upon the buyer having full knowledge of the condition of the crop before making the contract. Appellant then induced the grower to believe that it would not rely on any such claimed "warranty." Appellant should not now be heard to say that it had a secret reservation and then intended to assert such a claimed "warranty" if it subsequently decided not to accept the crop bargained for.

(d) The grower was caused to complete his performance at substantial expense in reliance upon the buyer's acts in making the harvesting advance payment and instructing him to continue picking. The buyer then had full knowledge of the manner of picking and of the mildew which appeared in the picked hops. The buyer was thereby estopped from asserting any excuse which it may previously have had on the ground of mildew.

In addition to, and independent of, the foregoing points, we submit that in any event these were merchantable hops, of good brewing value, and of "prime quality" in that they were equal to the average of cluster hops actually accepted in the

Oregon trade that year under this standard type of "prime quality" provision.

We respectfully submit that the trial Court's findings are clearly supported by the facts, that the Court's conclusions are sound in law, and that the findings and conclusions support the judgment.

Respectfully submitted,

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Portland, Oregon

July 29, 1950.

APPENDIX A

Explanatory Note: This appendix consists of the trial Court's findings of fact (S.R. 48-54), references to appellant's specifications of asserted error (Br. 13-18), and citations to the supporting evidence. The portions of the findings which are questioned by appellant are printed in italics, and the number following each italicized portion corresponds to the number of appellant's asserted error relating thereto.

Finding "1. At the time of the commencement of this action and at all times herein mentioned plaintiff was and is a citizen of the State of Oregon and defendant was and is a corporation incorporated and existing under the laws of, and a citizen of, the State of New York."

Asserted error: None.

Finding "2. The amount in controversy herein exceeds, exclusive of interest and costs, the sum of $3,000.00; and this Court has jurisdiction of the subject-matter, the parties and the cause of action."

Asserted error: None.

Finding "3. On or about August 19, 1947 plaintiff as seller and defendant as buyer entered into the written cluster hop agreement received in evidence herein. *By said agreement plaintiff contracted to sell and defendant contracted to buy the entire crop of cluster hops grown by plaintiff in 1947 on certain premises in Marion County, Oregon.*[1]

Pursuant to said contract plaintiff cultivated and completed the cultivation of said premises and *duly harvested, cured and baled said hops grown thereon in said year in a careful and husbandlike manner."*[2]

Asserted error No. 1 (Applt's Br. 13) to finding that the parties bargained for the "entire crop". This finding uses the contractual language (S. Ex. 1; S.R. 10):

> "* * * the seller does hereby bargain and sell, and * * * agrees to deliver * * * to the buyer, * * * *entire crop estimated at - - - ten - - -* thousand pounds (*10,000* lbs.) of *cluster* * * * hops grown on said premises * * *" (The italicized matter was typewritten on the printed form contract.)

The printed clause to which appellant refers is (S. Ex. 1; S.R. 12):

> "* * * the buyer * * * is to have the right to inspect the same before acceptance, and to accept any part less than *the whole of the hops so bargained for,* should for any cause the quantity of hops of the quality, character and kind above described, and which shall have been raised, picked and harvested from said premises and tendered for acceptance be less than the amount herein bargained and sold; * * *" (Italics ours.)

Thus, the parties contracted with respect to the "entire crop," although the buyer might elect, upon a certain condition, to take less than the entire crop. This condition did not occur (post, pp. xiv-xvi, xix-xx, xxiv-xxv).

Asserted error No. 2 (Applt's Br. 13-14) to finding that the cluster hops were properly harvested. Appellant's objection to this finding is that the baled

hops showed mildew. The objection assumes that the parties contemplated Mr. Smith would pick the clusters burr-by-burr to eliminate any trace of mildew, and that otherwise the harvesting would not be proper.

At the time the contract was made the buyer knew that, by the nature of the picking process, the harvested crop would show some mildew coloration (post, pp. v-viii, x), just as the buyer knew the baled hops would contain some leaves and stems (post, p. xiv). As the dealer's representative Mr. Fry said, speaking of the time when he inspected the picking baskets in the field and had Mr. Smith continue harvesting (post, pp. x, xxiii-xxiv), "Naturally there were red hops in there * * *" (S.R. 149, 212).

Such burr-by-burr picking was not in fact practiced in the hop business and was not feasible if possible at all (W.R. 100, 124, 227, 302; S.R. 149).

The hops when baled showed less mildew than they did in the field when the purchase was contracted, because Mr. Smith had the yard picked "selectively" in the sense that he instructed the pickers to skip the vines showing any bad mildew (S.R. 133-135). And the pickers did so. As Mr. Smith explained (S.R. 102):

> "* * * if there were a lot of small hops, undeveloped hops or nubbins, as they were called, on a vine, the picker would naturally pass them up because it would not make any weight in his basket.
>
> "However, there were hops with good clusters on, long strippers, and there might have been a few mildewed hops along with them that na-

turally went into the basket, but, in general, the heaviest branches, the heaviest infested branches, were passed up, and we estimate that they left about 25 per cent of the hops on the vines. There were some on all the vines that they left."

Finding "4. As a part of the same transaction plaintiff and defendant entered into another contract whereby plaintiff contracted to sell and defendant contracted to buy certain fuggle hops grown by plaintiff in 1947 on certain premises in Marion County, Oregon. Plaintiff duly performed all the terms and conditions on his part to be performed under said contract, and defendant received and accepted said fuggle hops, which consisted of 59 bales weighing 10,986 pounds net, at the price of 91 cents a pound. Against the total price of $9,997.26 was applied the advance payment of $3,500.00 made pursuant to said fuggle contract. The remaining balance was $6,497.26. On October 25, 1947 defendant tendered plaintiff its check in the amount of $3,497.26, bearing a notation that it was 'for Balance on contract delivery 59 bales fuggles.' In arriving at said amount defendant deducted the cluster contract advance hereinafter referred to. Plaintiff refused to accept the check because of the stated condition. Defendant did not at any time pay or offer to pay plaintiff without such condition said balance of $6,497.26 due under said fuggle contract, or said sum of $3,497.26, or

any other sum, and said balance remains due and unpaid."

Asserted error: None.

Finding "5. In 1947 there was, and defendant knew that there was, widespread mildew in cluster hop yards in the Willamette Valley in Oregon. The parties entered into said cluster hop contract shortly before picking time, and the hops which defendant contracted to buy were then formed and in existence on the vines. Before entering into said cluster hop agreement defendant inspected said cluster hop crop and *defendant knew that said hop crop* then showed some mildew and *would in normal course show such mildew when picked and baled.*[3] Such mildew in said hops did not become more prevalent or pronounced after said agreement was entered into."

Asserted error No. 3 (Applt's Br. 14, 33-34) to the finding that appellant knew the hop crop would in normal course show some mildew when picked and baled. This involves the same matter as uncontested Finding 7 (post, pp. ix-x), and asserted error 2 (ante, pp. ii-iv). Appellant's three objections to the finding, and the evidence relating thereto, are:

(a) Appellant suggests (Br. 33) that it could not have known that the baled crop would show some mildew because the mildew in 1947 was unusual.

Mildew itself is not unusual. As Mr. Oppenheim, president of appellant, said (G.R. 427), "We have had plenty of other attacks." The mildew in 1947 was uncommon because it was so widespread (G.R.

245), and because it came on so late in the season. As Mr. Noakes, another dealer's representative, explained (W.R. 340):

> "* * * it was very evident that there was going to be a right considerable amount of damage in the yards, mildew in most of the yards around the state; not all of them, but most of the yards around the state, and 1947 was unusual in this respect, that this mildew came on, this mildew attack came late in August, when under ordinar*ily* circumstances we would have very dry weather in which mildew does not work, but it did happen that this was a very rainy August and it brought this attack on. It had not happened that way to any extent any time before, nor since."

Mr. Oppenheim, speaking of the general condition of the Oregon yards early in August (G.R. 427), observed that the "hops were attacked in the bloom stage or burr stage and showed serious damage by downy mildew." That observation of Mr. Oppenheim's before harvest was confirmed later when he saw samples from the baled hops. He said (G.R. 439): "Well, I would say at least two out of four, maybe three out of four samples showed evidence of blight, some very serious, some in varying degrees."

Appellant was fully advised as to the unusual conditions (S.R. 255-256). Early in the 1947 hop-growing season the prospects were for a full Oregon crop (S.R. 190-191; W.R. 305). When the rainy weather in the summer brought on the mildew (G.R. 369), the hop buyers became concerned about a crop shortage. As Mr. Walker explained (G.R. 245-246), most of the Eastern hop dealers paid a visit

to the Oregon hop district to get first-hand information.

Mr. Oppenheim came out to Oregon to inspect the hop yards "when the downy mildew infestation was at its height" (G.R. 426). After making an inspection trip through the hop-producing section of the Willamette Valley (S.R. 208, 310), Mr. Oppenheim gave Mr. Paulus "orders to buy a few hundred bales additional of hops, and we agreed to take clusters as well as fuggles" (S.R. 310). Pursuant to those orders, Mr. Fry was authorized to, and did, negotiate the contract for the purchase of Mr. Smith's hops (S.R. 195, 228-229, 243-245).

On brief (p. 33) it is admitted that before entering into the cluster hop contract appellant inspected the crop and knew that it showed mildew. (And see S.R. 105, 211.) Mr. Oppenheim signed the contract for the purchase of these hops while he was still in Oregon (S.R. 230).

(b) Appellant suggests (Br. 33-34) that it did not know that the baled hops would in the normal course show such mildew because appellant did not know which particular hop cones would be picked.

But appellant did know that some of the touch of mildew, which it knew was general through the yard (S.R. 196), would show in the hops when picked and baled. Mr. Noakes, a dealer's representative, testified (W.R. 318):

> "Q. Would it be proper to say that the harvested hops showed the same mildew that the hops in the field had been showing for the past two months?
>
> A. If it was in the field, it would show in

> the samples unless—if it was general in the yard, it would show in the sample, yes."

Mr. Haas, vice-president of the other appellant, explained that on its own yard his corporation had the cluster hops picked with the greatest care ("absolutely hand-screened"), but even so the baled hops showed some mildew and 10% leaves and stems (W.R. 455-456, 465). (Mr. Smith's clusters had only 9% leaves and stems, S. Ex. 14.)

Mr. Walker, a grower with one of the larger hop operations in the state (G.R. 243), testified that his crop also had mildew in 1947 and that "naturally" some mildewed nubbins "would have to be" in the baled hops (G.R. 283).

With reference to the picking of these particular hops, Mr. Smith said (S.R. 102), "there might have been a few mildewed hops along with them that naturally went into the basket." And Mr. Fry said (S.R. 212), "Naturally there were red hops in there." Mr. Smith reported his conversation with Mr. Fry, who was out in the yard inspecting the picking, as follows (S.R. 149):

> "We were discussing the general amount of blight in hopyards of the Valley, and he [Mr. Fry] stated at that time that he didn't see how we could get away from getting some blight in."

(c) Appellant suggests (Br. 34) that the actual harvest of 73 bales, when compared with Mr. Fry's and Mr. Smith's pre-harvest estimate of 50 bales, is some evidence that the picking was not sufficiently selective.

When Mr. Fry signed Mr. Smith up on the sales slip and purchased his cluster hops (S.R. 195), the purchase was of the "entire crop" (S. Ex. 2). Even

though the entire crop was contracted for, however, it was necessary to have an estimate for the purpose of computing the harvesting advances of a specified amount per pound (S.R. 13, 15).

Mr. Fry and Mr. Smith mutually agreed on an estimate of 10,000 pounds, or about 50 bales (S.R. 138). It was strictly an estimate for, as Mr. Oppenheim said (G.R. 453), "Nobody in the world can guess a hop crop until it is in the bales." Mr. Smith said that the low estimate was intentionally conservative, so that he could be sure to deliver at least that amount (S.R. 138-141).

Mr. Fry inspected the actual picking, instructed Mr. Smith to continue, and made a larger harvesting advance than the contract called for. (See uncontested Finding 7, post, pp. ix-x; S.R. 174-175, 213-215.)

Finding "6. By said cluster hop agreement defendant contracted to make an advance payment to plaintiff of $2,500.00 in order to enable plaintiff to defray the necessary expenses of cultivating and picking said hops and of harvesting and curing the same. The agreement provided that defendant would have a prior lien upon said hop crop for any such advance payment, in accordance with the chattel mortgage provisions of said agreement."

Asserted error: None.

Finding "7. Said cluster hop agreement provided in substance that if said growing crop at or before the time of picking was not in such condition so as to produce the quality of hops called for under the terms of the agreement then the defend-

ant buyer would be discharged from any obligation to make said advance. Before and at the time of picking defendant knew that there was mildew in plaintiff's said crop of cluster hops, and that said crop when picked and baled would in normal course show such mildew. On or about August 26, 1947, defendant again inspected said hop crop during picking and before making the advance, and thereupon defendant elected to and did make the advance payment in the sum of $3,000.00, a larger amount than called for by the contract. Any defect which said hop crop may have had by reason of blight or mildew was apparent to defendant at the time of said inspection. Defendant at that time instructed plaintiff to continue picking said hops under said contract, and plaintiff did so in reliance upon defendant's said instruction and advance payment. The mildew in said crop did not thereafter become more pronounced or prevalent."

Asserted error: None.

Finding "8. *Plaintiff did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state*[4] and delivered the same in warehouse at the place and within the time agreed upon in said contract. On or about September 15, 1947, after said cluster hops had been picked, dried, cured and baled as aforesaid, *plaintiff, with the assent of defendant, delivered at* the Oregon Electric Company *warehouse* at Salem, Oregon, *all of said cluster hops and set same aside for defendant.*[5] Thereafter, defendant

inspected, sampled, marked and weighed said hops at that warehouse. The bales of hops constituting said crop were identified, segregated and *appropriated to the contract.*[5] *Plaintiff duly performed all of the terms and conditions of the agreement between the parties on his part to be performed."*[6]

Asserted error No. 4 (Applt's Br. 14) to finding that the grower did everything required to put the hops in a deliverable state. Appellant's objection here—that the harvested hops showed some of the same mildew which the hops in the field had shown —is the same point considered ante, pp. ii-iv, v-ix, ix-x.

Asserted error No. 5 (Applt's Br. 14-15, 41-42) to finding that grower, with buyer's assent, delivered the hops at warehouse and set them aside for defendant. Pursuant to the contract (S.R. 10), Mr. Smith delivered the hops to the Oregon Electric warehouse in Salem, and that place was acceptable to the buyer (S.R. 251). There the buyer's representative inspected, sampled, marked and weighed in the bales (S.R. 203-205, 215-216).

Appellant's objection to this finding concerns the legal significance of the word "assent". This legal question is discussed in appellee Geschwill's brief, pp. 58-60.

Asserted error No. 6 (Applt's Br. 15) to finding that appellee duly performed conditions precedent. Appellant's contention here is only that, "if the contract is construed in the manner advocated by the defendant" (Br. 15), the hops did not conform in quality to the contract. The substantial evidence that the hops did conform to the contract is referred to post, pp. xiv-xvi, xix-xx, xxiv-xxv.

Finding "9. Said cluster hops so weighed by defendant consisted of 73 bales, and had a total net weight, as determined by defendant, of 14,103 pounds. Said hops contained nine per cent leaves and stems and six per cent or more of seeds, as determined by an authorized governmental agency in accordance with said agreement."

Asserted error: None.

Finding "10. Said agreement provided that the price to be paid for the hops to be delivered would be the grower's market price for the kind and quality of hops delivered containing eight per cent of leaves and stems and six per cent or more of seeds, and that in the event the leaf and stem content exceeded eight per cent then the market price would be reduced one cent per pound for each one per cent increase of leaf and stem content to and including ten per cent. Pursuant to said contract, on or about September 18, 1947, plaintiff selected as the sale price for said cluster hops said grower's market price at that time which was 85 cents a pound, and duly notified defendant in writing thereof. Since the leaf and stem content was nine per cent, the contract price for said cluster hops was 84 cents a pound. The total contract price of said cluster hops was $11,846.52."

Asserted error: None.

Finding "11. Upon delivery as aforesaid plaintiff duly tendered said entire crop of cluster hops to defendant in warehouse at the place specified

in said agreement, and plaintiff was at all times ready, able and willing to give complete possession of said hops to defendant in exchange for the price. Defendant did not pay said purchase price or any part thereof except said partial advance payment. Said hops, as defendant knew, continued to be and are still held by the warehouseman. Defendant at all times has known that it could obtain said hops upon payment of the balance of said purchase price."

Asserted error: None.

Finding "12. On or about October 16, 1947, defendant rejected and refused to pay for said cluster hop crop tendered by plaintiff. On several occasions after said balance became due and owing, plaintiff duly made demand on defendant for the payment thereof. Defendant refused to pay for said hop crop on the particular ground that said cluster hops were blighted and dirty picked, and on no other specific ground. *By the term 'blighted' it was meant that the hops showed some mildew effect*[7] as stated above, and by the term 'dirty picked' it was meant that the hops contained over the average eight per cent leaf and stem content. *At the trial defendant advanced the same specific objections to the hops.*[8] *Upon the facts neither claimed defect was material.*[9] Said crop of hops was not any more blighted or mildewed than when defendant contracted to buy the same, or when defendant elected to make the advance payment, or when defendant instructed plaintiff to continue

picking. The leaf and stem content was within the tolerance allowed by the terms of said agreement. Said 1947 crop hops produced by plaintiff on said premises and *tendered to the defendant under said contract were merchantable.*"[10]

Asserted error No. 7 (Br. 15, 31) to finding that "blighted" refers to mildew. Mr. Oppenheim testified (S.R. 318), "badly blighted means mildew damage. It is the blight from the mildew." Appellant's counsel (Br. 9) explain the term "badly blighted" as "meaning damaged by mildew."

Appellant's objection to this finding is (Br. 15), "the undisputed evidence establishes that the defendant rejected the plaintiff's hops because of substantial damage by mildew." Such is not the undisputed evidence. Appellant assigned two reasons for the purported rejection; neither was true in fact; and the inference is that neither was the real reason.

(a) Claimed grounds for rejection. Upon the basis of one early type sample (S.R. 313), which in the opinion of Mr. Paulus was "hardly representative of the entire lot" (S.R. 261; S. Ex. 22), and which appellant did not introduce in evidence (S.R. 277), appellant determined to reject the hops upon the two stated grounds that they were "dirty picked" and "badly blighted" (S.R. 260).

(b) Neither claimed ground was true in fact. By the official analysis the picking was only 9% (S. Ex. 14) which was within the percentage allowed by the contract (S.R. 12). On trial Mr. Oppenheim admitted (S.R. 314) that the picking conformed to the contract.

As appellant knew when it contracted the purchase, when it made the harvesting advance, and when it instructed appellee to continue picking the crop (ante, pp. ii-x), the hops showed some mildew. But the mildew did not damage the lupulin, which is the valuable part of the hop (S.R. 182, 130). In other words, there was mildew, but there was no "substantial damage."

(c) Real reasons for rejection. Upon the basis of the early non-representative type sample (S. Ex. 22) appellant determined to reject the hops upon the claimed grounds of picking and mildew (S.R. 260). Upon receiving notice of the official analysis showing the picking to be within the percentage allowed by the contract (S. Ex. 18), appellant telegraphed Mr. Paulus (S. Ex. 21), "again advise you positively refuse accept delivery seventy-three bales Lot 64 and instruct you to reject this lot and demand refund all advances or apply same on fuggle delivery." Mr. Paulus suggested a fair examination and sent additional samples (S.R. 316; S. Ex. 22). Appellant then still refused to accept the hops but suggested that they be inspected and 10th bales samples forwarded (S. Ex. 27). A "form" inspection (G.R. 463-464) was conducted (S.R. 215-216); and appellant rejected them on the same specific claims of "badly blighted" and "dirty picked" (S. Ex. 29).

In view of the fact that appellant was fully advised about the mildew, that the claimed defect in picking was admittedly not true, and that no good-faith inspection of the baled crop was made, the Court could properly infer that appellant actually attempted to reject the hops for other reasons. The record indicates that the real reasons may have

included such considerations as the fact that the Oregon crop was not as short as appellant had expected and the market would undoubtedly fall off (S.R. 119, 173; G.R. 245-247, 265, 453), or that grain restrictions on brewers would curtail their production and thereby reduce the demand for hops (S.R. 323; W. Ex. 3-U), or that the prospect of a lowered tariff on imported hops would affect the market for domestic hops (S.R. 324).

Asserted error No. 8 (Applt's Br. 15-16) to finding that on trial appellant made the same specific objections (to picking and mildew). Appellant objects to this finding upon the ground that on trial it claimed "substantial" mildew rather than "some" mildew.

As to the degree of mildew, appellant does not contest the finding that the crop of hops was not any more blighted or mildewed than when appellant contracted to buy the same, or when appellant elected to make the advance payment, or when appellant instructed appellee to continue picking (ante, pp. ii-x).

In brewing value these cluster hops were at least average for the 1947 Oregon commercial lots tested at the Department of Agricultural Chemistry of Oregon State College (S. Ex. 36; S.R. 333-336). Mr. Cornoyer, the independent hop dealer, found that the mildew in the hops did not affect the lupulin, that the hops were merchantable, and that they were average for 1947 (S.R. 181-183). Mr. Aman, the hop grower, found that these hops were somewhat better than the general average in that year (S.R. 189-190).

Opposed to the testimony of the chemist, the independent hop dealer and the hop grower, appellant offered the testimony of two officials representing large dealer-litigants and the results of Mr. Hoerner's unique experiment. Appellant's witness, Mr. Ray, president of the corporation representing appellant John I. Haas, Inc., testified (S.R. 283):

> "* * * these being old samples, I based my opinion upon mildew damage only, which in my opinion was sufficient to disqualify the hops as prime quality."

(The evidence on Mr. Ray's personal opinion as to what constitutes prime quality, and the variance of his opinion from the trade practices, are discussed in appellee Geschwill's brief pp. 28-29, and the Appendix to that brief, pp. xviii-xix.)

Appellant also offered the opinion of Mr. Eismann, who is in charge of the Oregon district for S. S. Steiner, Inc. (S.R. 285), which was then also involved in hop litigation in the State courts concerning the 1947 crop (W.R. 385), and which is the other of the three large hop buyers (G.R. 252, 447; S.R. 288). Mr. Eismann testified from the samples (S.R. 289) that it was impossible for him to judge what the hops might have been as fresh hops but that they were in his opinion not prime because of dirty pick and mildew.

The third of appellant's witnesses on quality was Mr. Hoerner who testified about an unprecedented experiment (S.R. 272) which he had made at appellant's request (S.R. 267). To represent a crop of 14,103 pounds (ante, p. xii), he used a sample of much less than one ounce (15.2 grams, S.R. 268). Pursuant to his instructions, he separated out each

cone showing any slightest trace of mildew and called it an "infected" cone (S.R. 270). By that method he was able to say that the minute sample contained a high percentage by weight of "infected" cones (S.R. 268), but still less than the percentage of "infected" cones on the vines at the Oregon State College model yard that year (S.R. 270).

Mr. Oppenheim testified (S.R. 316) that the brewing value of a matured cone which was a little red from mildew on the outside was not impaired, and that it would be necessary to determine the degree of mildew of each burr to determine whether the brewing value was impaired. However, Mr. Hoerner testified as to his unique experiment (S.R. 270), "I wasn't requested to make any separation of degree of infection."

Even Mr. Oppenheim repudiated the results of the Hoerner experiment. Mr. Oppenheim testified (S.R. 318-319):

> "Q. You were here when Dr. Hoerner testified?
>
> A. Yes, sir.
>
> Q. He testified that any burr which showed the slightest trace of mildew on one petal was in his classification an infected burr. Now, do I understand you to say that such a burr, where there is just a slight trace of mildew on a petal, the brewing quality of that probably would not be affected?
>
> A. That would be my judgment, that the hop outside of a little discoloration on the outside is not seriously damaged. If they were all like that, the damage would be considered very

slight and probably would not impair the value of the hops or the brewing value, as you express it."

Asserted error No. 9 (Applt's Br. 16, 31-32) to finding that neither claimed defect was material. Both Mr. Oppenheim (S.R. 314) and Mr. Paulus (S.R. 260) admitted that the picking conformed to the contract.

The mildew was not material because:

(a) The buyer was fully advised concerning the mildew before it contracted the purchase, before it made the picking advance, and before it instructed appellant to continue picking (ante, pp. ii-x).

(b) The mildew did not damage the brewing value of the hops (ante, pp. xvi, xviii-xix).

(c) These hops were merchantable (post, pp. xix-xx). This was a market-price contract (S.R. 11), and the market had adjusted to the mildew by providing a 5 cent discount for the cluster hops susceptible to mildew, as compared with the mildew-resistant fuggle hops (S.R. 240, 311).

(d) These hops were at least the average of those actually accepted in the trade under such contracts that year (post, pp. xxiv-xxv).

Asserted error No. 10 (Applt's Br. 16, 29-31) to finding that the hops were merchantable. The independent hop dealer, Mr. Cornoyer, testified that the hops were merchantable (S.R. 181). There is no evidence to the contrary.

Appellant's counsel (Br. 16, 29-31) do not contest the fact that the hops were merchantable, but rather argue that the finding is irrelevant. This Court in the similar hop case of *Wolf v. Edmun-*

son, 240 Fed. 53, 59, regarded the "merchantable quality of the hops according to the custom of the hop trade" as the "real question of fact for determination." The evidence is that according to the custom of the hop trade in 1947 such hops as these were in fact accepted under contracts such as this (post, pp. xxiv-xxv).

Appellant (Br. 16) misconstrues "merchantable" to mean "salable at some price." The finding uses "merchantable" in its usual acceptation: "Fit for sale; vendible in market; of a quality such as will bring the ordinary market price." (Black's Law Dict., 3d Ed.)

The buyer's printed-form contract here was qualified by the buyer's mimeographed form rider attached to it. The rider provided (S. Ex. 1; S.R. 20): "The price to be paid for the hops to be delivered shall be the Grower's market price for the kind and quality of hops delivered * * *" with the usual premiums and discounts. The ordinary market price for good merchantable hops such as these was 85 cents a pound, which was the market price selected by Mr. Smith (W.R. 255; S.R. 192-193; ante, p. xii).

The majority of Oregon cluster hops that year showed mildew (ante, pp. v-vii). The ordinary market price had adjusted to that fact, in that the market price for cluster hops, being susceptible to mildew, was 85 cents, while the ordinary market price for fuggle hops, being resistant to mildew, was 90 cents (S.R. 240, 311).

See also appellee Geschwill's brief, pp. 31-34, and Appendix thereto, pp. xv-xvii.

Finding *"13. Plaintiff delivered the identical cluster hop crop which defendant contracted to buy.*[11] *Defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of hops would be any different in condition or quality than said crop actually was when tendered and delivered as aforesaid.*[12] *Said hops were of substantially the average quality of such Oregon cluster hops actually accepted in 1947 by the hop trade generally and by defendant under contracts containing the same type of quality provisions.*[13] *Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said contract."*[14]

Asserted error No. 11 (Appll's Br. 16-17) to finding that appellee delivered the identical cluster hop crop which appellant contracted to buy. By the terms of the contract (S.R. 10) "the seller does hereby bargain and sell" the entire crop of cluster hops from a designated farm, and agrees to deliver them. Likewise, by the terms of the contract (S.R. 12) the "buyer does hereby purchase the above described quantity of said hops and agrees to pay therefor * * *"

It is admitted on the pleadings (S.R. 4, 41) that "said hops were placed in storage" and "were there made available to the defendant for inspection." The finding is not contested that appellee "delivered the same [the specific crop of cluster hops] in warehouse at the place and within the time agreed upon in said contract." (Ante, p. x.)

At the time the contract was made the hops were formed and in existence on the vine. As Mr. Smith said (S.R. 138):

> "Most of the hop burrs were fully developed at that time. They were still a little tender; they had not fully matured."

Mr. Fry agreed that the hops "were already formed" (S.R. 196).

This was a sale of specific goods. (See appellee Geschwill's brief, pp. 6, 39-40, 58-59.)

Asserted error No. 12 (Appll's Br. 17, 32) to finding that appellant did not rely on any warranty that the hops would be other than they actually were when tendered and delivered. The contractual warranty (S.R. 11) does not mention mildew, but appellant asserts (Br. 26) that because the hops showed mildew they did not meet the general terms of the "warranty".

There is evidence that the hop trade that year did not in fact interpret the general language of the standard form of contract to require freedom from mildew. (See appellee Geschwill's brief, pp. 21-30; and post, pp. xxiv-xxv.)

Appellant points to no evidence that it expected to receive hops without mildew. Counsel simply say that this must be "conclusively presumed" (Br. 32).

The evidence is that appellant was fully advised about the mildew. Mr. Smith insisted that appellant be fully advised, because, as he testified (S.R. 174):

> "It was my opinion that they [the cluster hops] had mildew and if that had anything to do with it they [the Eastern dealers] can always

find something—some basis of rejecting hops when the market slips down. And they definitely had mildew and they knew it."

Speaking of Mr. Fry's visit to the yard before purchasing the hops for appellant, Mr. Smith said (S.R. 147):

"Well, he stated he wanted to buy hops, and I says, 'Well, let's go out and look at them.' I says, 'I have got some mildew.' And he says, 'Well, I know; they are infected all up and down the Valley. I have been running around looking at hopyards during the past week with Mr. Oppenheim.' I says, 'Well, you better come back and take a look at mine, then, and get an idea that you can talk to him about and tell him what they are like.' And he didn't want to go back, and I insisted because I wanted him to know what he was buying. So he did. We walked back there, and I purposely took him through. We crossed and crisscrossed all through the yard."

Mr. Fry went back to talk to Mr. Paulus about it and subsequently signed Mr. Smith up on the sales slip (S.R. 210-211).

Mr. Fry thereafter inspected the hops during picking (S.R. 110-113, 174-175, 213). The contract provided that if at the time of picking the hops would not produce the quality called for by the contract the buyer would be discharged of its obligation to make the harvesting advance payment (ante, pp. ix-x). Mr. Fry told Mr. Smith that he would look at the hops and if they were about the same as they had been before he would make the advance (S.R. 214). Mr. Fry examined the pickers'

baskets ("Naturally there were red hops in there," S.R. 212), and told Mr. Smith that he thought the picking was a little rough, i.e., too many leaves and stems (S.R. 217). Mr. Fry then made a harvesting advance in a sum larger than called for by the contract (S.R. 215). As Mr. Smith testified (S.R. 174-175):

> "He [Mr. Fry] said, 'Sure, we want you to pick them.' He says, 'If you need more money, call us and we will give you some more.' He said if I had to go to six or seven cents a pound [green weight for picking], why, feel free to ask for more money. * * *
>
> Q. And that is the time that you say he told you to pick?
>
> A. Yes; he saw how we had been picking and he saw what had been picked."

And see ante, p. x.

Asserted error No. 13 (Appll's Br. 17) to finding that the hops conformed to the quality provisions of the contract as those provisions were actually applied in practice. The evidence is that in 1947 all grower-dealer contracts called for one standard grade of "prime quality" (G.R. 283-284, 357, 452, 486). The evidence also is that the great part of the 83,000 bales of Oregon hops that year moved in the trade under such contracts, and that nearly all the cluster crops showed mildew (G.R. 250-251, 269, 394; W.R. 152-153). It seems self-evident that hops with a touch of mildew such as these were in fact accepted in the trade as "prime".

Mr. Cornoyer, the independent hop dealer, testified that these hops would not have been considered

"prime" *in prior years* because of the mildew (S.R. 180-181). But he testified that, while the majority of crops showed mildew, he took in all of the sixteen crops he had under contract that year, amounting to about 2500 bales, with a reduction in price in only one case (S.R. 183, 184). He found that these hops were merchantable, and that the mildew did not affect the lupulin (S.R. 181).

Mr. Cornoyer's experience was typical. The record abundantly shows that as a general practice in 1947 cluster hops with a touch of mildew, such as these, and covered by "prime quality" contracts, such as this, were in fact accepted by the hop dealers (e.g., W.R. 93, 124-125, 138-139, 152-153, 241-242, 315-316, 329-330, 455-457; W. Ex. 3-W; S.R. 191; G.R. 223-224, 240-241).

Asserted error No. 14 (Applt's Br. 17-18, 37) to finding that upon tender and delivery the cluster hops substantially conformed to the quality provisions of the contract. The only two objections made by appellant to the quality of the hops were, and are, to the leaf-and-stem content and the claimed "substantial damage" by mildew. The leaf-and-stem content admittedly was within the percentage allowed by the contract (ante, pp. xiv, xix). Even if appellant could assert any claim concerning the mildew (ante, pp. xxii-xxiv), the quality of the hops was not materially affected by the mildew (ante, pp. xvi, xviii-xix).

Finding *"14. On plaintiff's first cause of action, relating to the cluster hops, there became due and owing from defendant to plaintiff* on October 31, 1947, *the sum of $8,846.52,*[15] being the contract price

of $11,846.52 less the advance of $3,000.00. No part of said balance has been paid."

Asserted error No. 15 (Applt's Br. 18) to finding that the balance of the price of the cluster hops is due from appellant. Appellant again asserts that, "if this contract is construed in the manner advocated by the defendant," the balance would not be due because of the claimed defect in quality of the hops. Citations to the evidence on quality are set out ante, pp. xiv-xvi, xix-xx, xxiv-xxv.

Finding "15. On plaintiff's second cause of action, relating to the fuggle hops, there became due and owing from defendant to plaintiff on October 31, 1947, the sum of $6,497.26, being the contract price of $9,997.26 less the advance of $3,500.00. No part of said balance has been paid."

Asserted error: None.